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No. 08-790

# In the Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY, ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the United States may waive the prohibition against the assignment of claims against the United States contained in the Assignment of Claims Act, 31 U.S.C. 3727, when the claim at issue is a takings claim.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 542 F.3d 889. The opinion of the Court of Federal Claims (Pet. App. 11a-40a) is reported at 79 Fed. Cl. 205.

### JURISDICTION

The judgment of the court of appeals was entered on September 18, 2008. The petition for a writ of certiorari was filed on December 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Two statutes, 41 U.S.C. 15 and 31 U.S.C. 3727 (collectively, the Anti-Assignment Act), generally "preclude * * * the voluntary assignment of legal rights as

against the Government to third parties." Pet. App. 33a. The Assignment of Contracts Act provides that "[n]o contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned." 41 U.S.C. 15(a). The Assignment of Claims Act, the statute directly at issue in this case, generally prohibits the assignment of "a claim against the United States" unless certain conditions are met. 31 U.S.C. 3727(a)(1). "An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. 3727(b). The statute also lists a number of procedural steps that must be followed before the assignment will be valid. *Ibid.*[1]

As this Court has recognized, the statutes described above were enacted "for the protection of the Government." *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366, 371 (1949). Accordingly, courts have long held that the government may waive the protections of the Anti-Assignment Act and accept the assignment of a contract or claim. See, *e.g.*, *Cadwalder* v. *United States*, 45 F.3d 297, 299 (9th Cir. 1995); *Tuftco Corp.* v. *United States*, 614 F.2d 740, 746 (Ct. Cl. 1980); *United Pac. Ins. Co.* v. *United States*, 358 F.2d 966, 970 (Ct. Cl. 1966); *American Nat'l Bank & Trust Co.* v. *United States*, 23 Cl. Ct. 542, 546 (1991); *Maffia* v. *United States*, 163 F. Supp. 859, 862 (Ct. Cl. 1958).

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[1] Both the Assignment of Contracts Act and the Assignment of Claims Act have limited exceptions for assignments to financial institutions. 31 U.S.C. 3727(c); 41 U.S.C. 15(b). Those exceptions are not at issue in this case.

2. In the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10101 *et seq.*, Congress directed the Department of Energy (DOE) to provide a solution for the permanent storage and disposal of spent nuclear fuel. 42 U.S.C. 10131-10134. Congress authorized DOE to enter into contracts with the owners and generators of commercially-generated domestic nuclear power through which DOE would dispose of their spent nuclear fuel. 42 U.S.C. 10222(a). Through notice-and-comment rulemaking, DOE developed a standard contract that would be used to furnish disposal services to generators of spent nuclear fuel. 48 Fed. Reg. 16,590 (1983) (codified at 10 C.F.R. 961.11). The standard contract stated that the "services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998." 48 Fed. Reg. at 16,600; see 42 U.S.C. 10222(a)(5)(B).

In 1983, DOE entered into such contracts with numerous utilities, including PSEG Nuclear, LLC and Public Service Gas and Electric Co. (collectively, PSEG) and a predecessor of Exelon Generation Company (Exelon). Pet. App. 13a-14a & n.2. DOE was not able to begin accepting spent nuclear fuel by January 31, 1998, as required by the contracts. *Id.* at 2a. Both PSEG and Exelon filed lawsuits in the Court of Federal Claims (CFC) seeking damages for breach of contract, including the costs of continued on-site storage of their spent nuclear fuel. The United States has settled Exelon's lawsuit, but PSEG's lawsuit remains pending before the CFC. See *PSEG Nuclear, LLC* v. *United States*, No. 01-551C (filed Sept. 26, 2001).

3. Petitioners owned minority interests in some of Exelon's and PSEG's nuclear power reactors. Pet. App.

3a. Petitioners were not signatories to the disposal contracts. *Id.* at 11a-12a.

In 1999, petitioners executed written purchase and sale agreements through which they conveyed their minority interests to PSEG and Exelon. Pet. App. 3a, 13a-14a. In those agreements, petitioners purported to assign all of their claims against DOE to PSEG and Exelon. *Ibid.* In particular, Section 2.1 of the agreements listed as part of the "Purchase Assets":

> *All claims* of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (*including all claims for failure by the Department of Energy to take Spent Nuclear Fuel*) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and *all other claims* of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets, other than [specified excluded claims].

*Id.* at 4a-5a (quoting agreements; emphasis added). That provision was followed by a list of 13 separate "Excluded Assets." *Id.* at 5a.

4. Four years later, petitioners filed suit against the United States in the CFC, seeking to recover damages for breach of the spent nuclear fuel disposal contract and for an alleged taking under the Fifth Amendment to the United States Constitution. Pet. App. 3a. Petitioners alleged that they had obtained a reduced purchase price for their minority interests because DOE's breach of contract had lowered the value of the nuclear plants,

and that the reduction in the purchase price constituted a taking. *Ibid.*[2]

When PSEG became aware of petitioners' claims, it invoked the arbitration clause in the purchase and sale agreements. Pet. App. 3a. In arbitration, PSEG argued that petitioners had assigned them all claims, including takings claims, against DOE arising from the disposal contracts. *Ibid.* The arbitrators agreed with PSEG. *Id.* at 4a. The government was not a party to the arbitration proceedings. *Id.* at 3a-4a.

Petitioners challenged the arbitration award in state court in New Jersey, and the court upheld the award. Pet. App. 4a. Petitioners then moved to vacate the arbitration award in the CFC in this lawsuit. *Ibid.* PSEG intervened in this case for the limited purpose of defending the arbitration award and assignment of claims. *Id.* at 21a.

Recognizing that the Assignment of Claims Act, 31 U.S.C. 3727, normally would prohibit the assignment of petitioners' claims, the CFC asked the government whether it wished to waive its rights under the Act and accept the assignment. Pet. App. 4a. The government filed a written notice stating that it had elected to accept the assignment. *Ibid.* That notice provided:

> [T]he Government is exercising its sole discretion to accept the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase

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[2] Petitioners value their takings claim at "$80 to $100 million." Pet. 3. There is no record support for that assertion.

> and sale agreements that have been included in the appendices to some of the briefing in this case.

*Id.* at 53a-54a.

The government then moved for summary judgment, arguing that petitioners had no cognizable claims because they had assigned all of their claims to PSEG in the purchase and sale agreements, and the government had accepted that assignment. Pet. App. 15a-16a, 29a-30a. The government also argued that petitioners' takings claims failed as a matter of law because they were premised on a breach of contract. *Id.* at 16a, 30a.

5. The CFC denied petitioners' motion to vacate the arbitration award and granted the government's summary judgment motion. Pet. App. 11a-40a. The CFC held that petitioners were not entitled to any relief because they had assigned to PSEG all of their claims, including their takings claims, and the government had validly accepted that assignment. *Id.* at 29a-40a. The court rejected petitioners' arguments that their written assignments were rendered void by the Assignment of Claims Act, 31 U.S.C. 3727. Pet. App. 35a-36a. The court recognized that the Act bars private parties from assigning their claims against the government except under certain specified conditions. *Id.* at 32a-33a. The court explained, however, that the government may waive the Act's protections because "[t]he Assignment of Claims Act operates for the benefit of the Government" and is "intended to protect the Government from voluntary assignments of contracts or claims to parties where it has not consented to or recognized the assignment." *Id.* at 34a-36a (citing *Aetna Cas. & Sur. Co.*, *supra*). Because the government had expressly accepted petitioners' assignment of its claims to PSEG in this

case, the court explained, "all assignments of such contracts and claims * * * are valid." *Id.* at 36a-37a.

The CFC further held that petitioners' takings claims were encompassed within the assignment clause in the purchase and sale agreements. Pet. App. 37a-39a. The court explained that the "plain language of the written agreement" (*id.* at 39a) makes clear that petitioners transferred to PSEG all claims against DOE, including any takings claims:

> Section 2.1(*l*) of the [purchase and sale agreements] transferred to buyers not only "[a]ll claims of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract," but also "*all other claims* of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets . . ." The [spent nuclear fuel] was one of these Purchased Assets, and [petitioners'] takings claims, whatever their merits, are "claims of the Seller against the Department of Energy with respect to, arising out of, or in connection with" that [spent nuclear fuel].

*Ibid.* (citations omitted).[3] Because petitioners had assigned all of their claims to PSEG, and the government had accepted that assignment, the court granted summary judgment for the government. *Id.* at 40a.

6. The court of appeals affirmed. Pet. App. 1a-10a. The court held that "[t]he language of the assignment clause of the Transfer Agreements on its face covers the taking claims" because it includes among the purchased

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[3] The court noted that petitioners had not challenged the government's authority to waive the protections of the Assignment of Claims Act with respect to their breach of contract claims. Pet. App. 38a n.11.

assets "'[a]ll claims of the Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract'"—"'including all claims for failure by the Department of Energy to take Spent Nuclear Fuel'"—and "'all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets.'" *Id.* at 4a-5a (quoting agreements). The court noted that petitioners did not contest that understanding of the assignment clause. *Id.* at 4a.

The court of appeals rejected petitioners' argument that they could void their own claims assignments when the government was willing to accept the assignments. Pet. App. 5a-8a. The court explained that, although the Assignment of Claims Act would normally prohibit an assignment such as the one at issue here, *id.* at 5a-6a, it has long been recognized that the Act was enacted "for the protection of the Government," *id.* at 8a (quoting *Aetna Cas. & Sur. Co.*, 338 U.S. at 371), and that "the Government, if it chooses to do so, may recognize an assignment," *id.* at 7a-8a (quoting *Tuftco Corp.*, 614 F.2d at 745). Here, the court explained, the government had expressly accepted petitioners' assignment of their claims, and the government's "recognition and acceptance of such an assignment makes it a valid assignment." *Id.* at 9a.

For purposes of the waiver analysis, the court of appeals found no reason to distinguish between the Assignment of Claims Act and the Assignment of Contracts Act. Pet. App. 8a-9a. Although the two statutes "deal with different aspects of relationships and dealings with the government," the court explained, "they serve the common goal of protecting the government from similar problems that may arise from those relationships." *Id.*

at 8a. Thus, with respect to both assignment of contracts and assignment of claims, if "the government concludes that it is appropriate and in its best interest to accept the assignment, it may do so." *Id.* at 9a.

## ARGUMENT

Petitioners conceded below that the plain language of the assignment clause at issue here includes takings claims, see Pet. App. 4a-5a, 39a, and that the government generally has the authority to waive the protections of the Assignment of Claims Act, see *id.* at 38a n.11. Petitioners contend, however, that the government's general authority to accept assignments of claims does not encompass takings claims. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, this case would present a poor vehicle to consider the question presented because petitioners' takings claims fail as a matter of law. Further review is not warranted.

1. The court of appeals correctly held that the government may waive the protections of the Assignment of Claims Act and accept the assignment of petitioners' takings claims. As the court recognized (Pet. App. 5a-6a), the Assignment of Contracts Act and the Assignment of Claims Act "broadly prohibit * * * transfer of contracts involving the United States or interests therein, and assignment of claims against the United States," except under the particular conditions identified in those statutes. *Fireman's Fund Ins. Co.* v. *England*, 313 F.3d 1344, 1349 (Fed. Cir. 2002). To the extent that the conditions in the statutes are satisfied, the government is required to recognize the assignments. Absent satisfaction of those statutory conditions, however, no private

entity can enforce a voluntary contract or claim assignment against the government. *United States* v. *Shannon*, 342 U.S. 288, 291-293 (1952).

Nonetheless, the government may waive the protections of both the Assignment of Claims Act and the Assignment of Contracts Act. As this Court has long recognized, those statutes were enacted for the sole benefit and protection of the government. *Shannon*, 342 U.S. at 291-292; *Aetna Cas. & Sur. Co.*, 338 U.S. at 371-373; *McKenzie* v. *Irving Trust Co.*, 323 U.S. 365, 369 (1945); *Martin* v. *National Sur. Co.*, 300 U.S. 588, 594 (1937); *McGowan* v. *Parish*, 237 U.S. 285, 294 (1915); *Hobbs* v. *McLean*, 117 U.S. 567, 576 (1886); *Goodman* v. *Niblack*, 102 U.S. 556, 560 (1881).[4] It is therefore the government, and only the government, that can invoke their protections. See *Martin*, 300 U.S. at 594-596; see also *Cessna Aircraft Co.* v. *Dalton*, 126 F.3d 1442, 1451-1452 (Fed. Cir. 1997) ("[I]f the primary intended beneficiary of a statute or regulation is the government, then a private party cannot complain about the government's failure to comply with that statute or regulation, even if that party derives some incidental benefit from compliance with it."), cert. denied, 525 U.S. 818 (1998); *United States* v. *Certain Space in the Prop. Known as the Chimes Bldg.*, 320 F. Supp. 491, 496 (N.D.N.Y. 1969)

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[4] In particular, the statutes were designed "to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government"; "to prevent possible multiple payments of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant"; and "to save to the United States defenses which it has to claims by an assignor by way of set-off, counter claim, etc., which might not be applicable to an assignee." *Shannon*, 342 U.S. at 291-292 (internal quotation marks and citations omitted).

("The Anti-Assignment Act is for the government's protection and only the United States may assert it."), aff'd, 435 F.2d 872 (2d Cir. 1970) (per curiam), cert. denied, 402 U.S. 908 (1971).

The lower courts have consistently held that, notwithstanding the prohibitions of the Anti-Assignment Act, the government can accept an assignment that it deems to be in its own best interests. *Cadwalder*, 45 F.3d at 299; *Tuftco Corp.*, 614 F.2d at 745; *Vermont Yankee Nuclear Power Corp.* v. *United States*, 73 Fed. Cl. 236, 241 (2006); *Riviera Fin. of Tex., Inc.* v. *United States*, 58 Fed. Cl. 528, 530 (2003); *American Nat'l Bank & Trust Co.*, 23 Cl. Ct. at 546 (1991); *Maffia*, 163 F. Supp. at 862. This Court has also repeatedly suggested that the government may waive the protections of the Anti-Assignment Act. See *McGowan* v. *Parish*, 237 U.S. 285, 294 (1915) ("It has several times been declared by this [C]ourt that the statute was intended solely for the protection of the government and its officers during the adjustment of claims, and that, after allowance, the protection may be invoked or waived, as they in their judgment deem proper."); see also *Aetna Cas. & Sur. Co.*, 338 U.S. at 373 ("The rigor of this rule [prohibiting assignments under the Assignment of Claims Act] was very early relaxed in cases which were thought not to be productive of the evils which the statute was designed to obviate.").

Because the government may waive the protections of the Anti-Assignment Act, and it unambiguously did so here, all of petitioners' claims were assigned to PSEG. The court of appeals therefore correctly determined that the government was entitled to summary judgment.

2. Petitioners contend (Pet. 12-20) that the government cannot waive the protections of the Assignment of Claims Act at all. Petitioners waived that argument below, however, by conceding that the government may accept the assignments of their *breach of contract* claims. See Pet. App. 38a n.11; C.A. App. 732, 734-735 n.4. In any event, no court has held that the government may not waive the protections of the Assignment of Claims Act, and several federal courts have long held to the contrary.

Petitioners rely on several cases that state the general rule that the Assignment of Claims Act prohibits private parties from assigning claims against the government. Pet. 13-14 & n.10 (citing *National Bank of Commerce* v. *Downie*, 218 U.S. 345 (1910), *Nutt* v. *Knut*, 200 U.S. 12 (1906), *Spofford* v. *Kirk*, 97 U.S. 484 (1878), and *United States* v. *Gillis*, 95 U.S. 407 (1877)). None of those decisions, however, addresses the question whether the government may waive the protections of the Assignment of Claims Act. See Pet. App. 9a (explaining that none of petitioners' cited cases "involved any question of, or decided whether the government could recognize as valid, an assignment of claims that would otherwise violate the statute").

Petitioners' reliance (Pet. 12) on *McKnight* v. *United States*, 98 U.S. 179 (1879), is likewise misplaced. The Court in *McKnight* did not address the question whether the government may waive the protections of the Assignment of Claims Act and accept assignment of a claim. Rather, the Court held that the government's payment of part of an assigned claim did not waive the government's right to object to the remainder of the assignment because the assignment "conferred no right that the United States was bound to regard." *Id.* at 186.

The Court further held that the circumstances did not show that the government had intended to accept the entirety of the claim, noting in particularly that "[t]here could have been no consideration for" such a waiver. *Ibid.*

Here, by contrast, the CFC found that the government had accepted the assignment, Pet. App. 36a-37a, and petitioners have not challenged that finding. The government obtained a direct benefit from acceptance of the assignment—the ability to litigate damages from the government's breach of contract in a single case. *McKnight* does not suggest that the government may never accept an assignment of a claim. To the contrary, the Court noted that, although the government was not required to do so, it had permissibly accepted the assignment of part of the claim in that case. 98 U.S. at 185-186.

The court of appeals correctly rejected petitioners' argument that the government's ability to accept an assignment differs in the contexts of the Assignment of Contracts Act and Assignment of Claims Act. As the court explained, "[a]lthough the two provisions deal with different aspects of relationships and dealings with the government, they serve the common goal of protecting the government from similar problems that may arise from those relationships." Pet. App. 8a. Consistent with that reasoning, the lower courts have long held that the government may waive the protections of either statute. See, *e.g.*, *Tuftco Corp.*, 614 F.2d at 744-745 & n.4 (explaining that, on the question of waiver, "the concerns of the two statutes and the legal concepts involved in their applicability are the same").

To the extent this Court has spoken on the question presented, it has rejected petitioners' argument. This

Court has repeatedly acknowledged that the Assignment of Claims Act was enacted for the protection of the government, see, *e.g.*, *Aetna Cas. & Sur. Co.*, 338 U.S. at 373 (citing cases), and it has suggested that the government may waive the protections of the Act when doing so is in the government's best interests, see *id.* at 373-374; *McGowan*, 237 U.S. at 294; *McKnight*, 98 U.S. at 185-186. Further, there is no disagreement in the lower courts on this point. The Federal Circuit and its predecessor court, the Court of Claims, have long held that the government may waive the protections of the Assignment of Claims Act. See, *e.g.*, *Tuftco Corp.*, 614 F.2d at 745; *Maffia*, 163 F. Supp. at 862. The only other court of appeals that has considered the issue has agreed. See *Cadwalder*, 45 F.3d at 299.

3. Petitioners contend (Pet. 10-11) that the government's authority to waive the protections of the Assignment of Claims Act does not include takings claims. That argument lacks merit. The court of appeals determined, and petitioners did not contest, that their takings claims are encompassed within the plain language of the assignment clause in their agreements with PSEG. Pet. App. 4a-5a, 39a. And nothing in the language or purposes of the Assignment of Claims Act distinguishes takings claims from any other types of claims. To the contrary, the Act is broadly intended to protect the government in its dealings with parties, and a rule barring the government from waiving the prohibition against assignments of any particular claim—including a takings claim—would disserve that underlying purpose. See

*Aetna Cas. & Sur. Co.*, 338 U.S. at 373; *NRG Co.* v. *United States*, 31 Fed. Cl. 659, 661-664 (1994).[5]

Contrary to petitioners' contention (Pet. 10-11), the ruling below does not conflict with this Court's decision in *United States* v. *Dow*, 357 U.S. 17 (1958). The Court in *Dow* did not address the question whether the government may accept an assignment of a takings claim. Instead, the Court addressed the distinct issue of when a takings claim had vested—whether in that case "the claim to 'just compensation' vested in the owners of the land at the time the United States entered into possession of the easement * * * in 1943 or whether such claim vested * * * at the time the United States filed a declaration of taking in 1946." *Id.* at 18. The Court held that the takings claim had vested in 1943 when the government "entered and appropriated the property to public use." *Id.* at 23. As a result, the Court explained, Dow could not bring a takings claim, because he had purchased the property in 1945, after the takings claim had vested. *Id.* at 21.

Dow attempted to avoid that result by arguing that the prior owners had assigned their takings claim to him. *Dow*, 357 U.S. at 20. The Court rejected that contention, explaining that "the Assignment of Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property." *Ibid.* The Court had no occasion to decide, however, whether the government may waive its rights under the Assignment of Claims Act, see Pet. App. 35a n.8, nor did it suggest that the Assignment of Claims Act

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[5] As the decision in *NRG Co.* makes clear, petitioners are mistaken in contending (Pet. 3) that the United States has never accepted the assignment of a takings claim.

distinguishes between a takings claim and any other type of claim.

4. Even if the question presented warranted this Court's review, this would be an inappropriate case in which to address it, because petitioners' takings claim fails as a matter of law. Petitioners' takings claim is based on the government's contractual agreement to accept spent nuclear fuel, and their remedies therefore are limited exclusively to contract remedies.[6] It is well-settled that where a party's rights are created by contract with the government, a party cannot state a takings claim against the government founded upon a breach of that contract. See, *e.g.*, *Castle* v. *United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002), cert. denied, 539 U.S. 925 (2003); *Smith* v. *United States*, 58 Fed. Cl. 374, 388-389 (2003), aff'd, 110 Fed. Appx. 898 (Fed. Cir. 2004) (per curiam), cert. denied, 544 U.S. 1033 (2005). When a party enters into a contract, that party has either the right to receive performance or, if a breach occurs, the right to receive damages pursuant to contract law. See *Plaintiffs in Winstar-Related Cases* v. *United States*, 37 Fed. Cl. 174, 187 n.9 (1997), aff'd *sub nom. Ariadne Fin. Servs. Pty. Ltd.* v. *United States*, 133 F.3d 874 (Fed. Cir.), cert. denied, 525 U.S. 823 (1998); see also *Northwest Airlines, Inc.* v. *United*

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[6] Any right petitioners had to acceptance of their spent nuclear fuel was pursuant to the disposal contract, rather than to the NWPA itself. The NWPA does not require DOE to accept spent nuclear fuel from any entity. Rather, it authorizes the Secretary of Energy "to enter into contracts with any person who generates or holds title" to spent nuclear fuel "for the acceptance of title, subsequent transportation, and disposal of such waste." 42 U.S.C. 10222(a)(1). Absent such contracts, DOE had no obligation to accept spent nuclear fuel from any particular entity.

*States Dep't of Transp.*, 15 F.3d 1112, 1120 n.5 (D.C. Cir. 1994).

Unless the government deprives the contracting party of its contract remedies, the government does not effect a taking. See *Castle*, 301 F.3d at 1342; *Bailey* v. *United States*, 53 Fed. Cl. 251, 256-257 (2002), aff'd, 341 F.3d 1342 (Fed. Cir. 2003), cert. denied, 541 U.S. 1072 (2004). Courts have repeatedly applied that principle in the context of government contracts for the disposal for spent nuclear fuel, holding that claims for damages based on the government's breach of contract must be litigated as contract claims, not as takings claims. See *System Fuels, Inc.* v. *United States*, 78 Fed. Cl. 769, 809 (2007); *Northern States Power Co.* v. *United States*, 78 Fed. Cl. 449, 472 (2007); *Pacific Gas & Elec. Co.* v. *United States*, 70 Fed. Cl. 766, 777-779 (2006); *Canal Elec. Co.* v. *United States*, 65 Fed. Cl. 650, 656 (2005). Just as in those cases, petitioners' only possible right to recover from the government arose from the disposal contract, and they have not alleged that the government has taken any contractual remedies that would otherwise be available to them.

5. Contrary to petitioners' contention (Pet. 3), the government has not argued that its acceptance of an assignment of a takings claim automatically extinguishes the claim. The court of appeals did not suggest that petitioners' takings claims had been extinguished, but rather held that the claims had been assigned to another party (PSEG). As a result of that assignment, PSEG may now assert all claims, including takings claims, that previously belonged to petitioners.

The government has contended that, if PSEG pursues petitioners' takings claim, then any money awarded for that claim should be offset against PSEG's award for

breach of contract. See Pet. App. 53a. In the government's view, such an offset would be appropriate because petitioners' takings theory is that PSEG paid a reduced price for petitioners' interests in order to compensate itself for the future costs that it expected to incur to store spent nuclear fuel because of DOE's breach of contract. But in any event, the propriety of any such offset is a matter to be litigated between the government and PSEG. It is of no concern to petitioners, who assigned their takings claims pursuant to a written agreement under which they received compensation. See, *e.g.*, *Dow*, 357 U.S. at 27.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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